

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VINCENT R. VENDETTI and U.S. POSTAL SERVICE,
POST OFFICE, Whitestone, NY

*Docket No. 02-30; Submitted on the Record;
Issued May 9, 2003*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issues are: (1) whether appellant forfeited his right to compensation for the period March 21, 1994 to June 21, 1995, for knowingly failing to report earnings during that period; (2) whether appellant was at fault in the resulting overpayment of compensation in the amount of \$27,743.39; (3) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on January 28, 1999 on the basis of his conviction in violation of 18 U.S.C. § 1920; and (4) whether appellant was at fault in the creation of an overpayment of compensation in the amount of \$7,724.10 that arose from his receipt of compensation from January 28 to May 22, 1999.

The Office accepted that appellant sustained a herniated lumbar disc in a traumatic injury sustained on January 5, 1984.

On June 21, 1995 appellant, who was then receiving compensation for temporary total disability, completed an Office Form CA-1032. This form stated:

“Report ALL self-employment or involvement in business enterprises. These include but are not limited to: farming; sales work; operating a business, including a store or restaurant; and providing services in exchange for money, goods, or other services. The kinds of services which you must report include such activities as carpentry, mechanical work, painting, contracting, child care, odd jobs, etc. Report activities such as keeping books and records, or managing and/or overseeing a business of any kind, including a family business. Even if your activities were part-time or intermittent, you must report them.”

* * *

“Report ANY work or ownership interest in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to others. If you performed any duties in any business enterprise, for which you were not

paid, you must show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties you did, even if your work was for yourself or a family member or relative. You need not list ownership in any publicly traded businesses.

“Severe penalties may be applied for failure to report all work activities thoroughly and completely.” (Emphasis added).

Directly below these paragraphs, appellant answered “No” to the question “Were you self-employed or involved in any business enterprise in the past 15 months?” Above appellant’s signature, the form states, under Part G -- Certification: “I know that anyone who fraudulently conceals or fails to report income or other information, which would have an effect on benefits, or who makes a false statement or misrepresentation of a material fact in claiming a payment or benefit under the Federal Employees’ Compensation Act may be subject to criminal prosecution, from which a fine or imprisonment, or both, may result.”

In an investigative memorandum dated May 24, 1999, a postal inspector noted that on June 9, 1998 appellant was indicted by a federal grand jury, charged with making a false statement to obtain federal employees’ compensation, a violation of 18 U.S.C. § 1920.¹ Appellant pled guilty to a two-count superceding misdemeanor information² on January 28, 1999 and was convicted on that date of a violation of 18 U.S.C. § 1920. On April 20, 1999 appellant was sentenced to one year of probation. Accompanying the postal inspector’s investigative memorandum and corroborating the assertions made therein were a judgment in the criminal case of U.S. v. appellant in the U.S. District Court, Southern District of New York and the two-count superceding information filed by the United States Attorney in that case.

The Office obtained a copy of a plea agreement signed by appellant and his attorney on January 20, 1999, whereby the United States Attorney accepted a guilty plea to the two misdemeanors of the superceding information and in consideration of this plea, agreed not to further prosecute appellant criminally for making false and fraudulent statements in connection with his June 21, 1995 Office form. The plea agreement noted that “the [c]ourt may also impose an order of restitution,” and that “It is further understood that this [a]greement does not bind any federal, state, or local prosecuting authority other than this Office.” The Office also obtained a copy of the criminal docket for appellant’s case.

By decision dated June 18, 1999, the Office found that appellant forfeited his entitlement to compensation after January 28, 1999 on the basis of his plea of guilty to a violation of 18 U.S.C. § 1920.

¹ 18 U.S.C. § 1920 states: Whoever knowingly and willfully falsifies, conceals, or covers up a material fact, or makes a false, fictitious, or fraudulent statement or representation, or makes or uses a false statement or report knowing the same to contain any false, fictitious, or fraudulent statement or entry in connection with the application for or receipt of compensation or other benefit or payment under subchapter I or III of chapter 81 of title 5, shall be guilty of perjury and on conviction thereof shall be punished by a fine under this title, or by imprisonment for not more than 5 years, or both; but if the amount of the benefits falsely obtained does not exceed \$1,000.00, such person shall be punished by a fine under this title, or by imprisonment for not more than 1 year, or both.

² The other count involved using a false and fraudulent income tax return to obtain a bank loan for an automobile.

On July 14, 1999 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$7,724.11 on the basis that he was paid compensation from January 28 to May 22, 1999. The Office preliminarily found appellant at fault in the creation of this overpayment. Also on July 14, 1999 the Office issued a preliminary determination that appellant received an overpayment of compensation in the amount of \$48,557.54 that arose from a forfeiture of compensation from April 1, 1993 to June 21, 1995, for failure to report earnings from self-employment. The Office preliminarily found appellant at fault in the creation of this overpayment.

On July 31, 1999 appellant requested a hearing, which was held on December 2, 1999. Appellant testified that he only invested money in a restaurant called Treasures of the Sea, that he lost over \$100,000 of his mother's money in this venture, that he did not hire employees or decorate and that he "never did anything" such as bookkeeping. Appellant also testified that he thought he had to be physically involved in order to be required to report on the Office Form CA-1032. The accountant for Treasures of the Sea testified that the restaurant operated from April to August 1994, that he got all the information for the restaurant's tax returns after it opened from the manager, not from appellant, that appellant did not take any money from the business and that appellant did "all the setting up" of the restaurant and signed the checks for expenses.

In a letter dated September 14, 1999, the accountant for Treasures of the Sea stated that appellant never earned any money from the restaurant, did not run the business and was an investor whose sole responsibility was to write blank checks. In a November 21, 1999 affidavit, appellant's mother averred that appellant was in California with her for a good portion of the time the restaurant was in operation in New York from April to August 1994. Appellant submitted copies of airline tickets and car rental agreements showing he traveled to California in May, July and August 1994.

Appellant submitted transcripts of his January 20 and 28, 1999, appearances before the judge in his criminal case. In the January 20, 1999 appearance, appellant answered that he agreed that he concealed information in filling out the June 21, 1995 Office Form CA-1032, that that was the basis for his pleading guilty and that he did it knowingly. The judge advised appellant that, if there was doubt in his mind that he committed a crime, he should not plead guilty and asked appellant "whether or not you admit knowingly omitting something that you knew should have gone on the form." Appellant responded, "At the time, your Honor, when I was filling the forms out, I was n[o]t sure about the form myself, so I asked other people if I was filling the form out right and I guess instead I should have called the Department of Labor up to ask them if I was filling the form out right and I asked these other people who I thought were knowledgeable and they said yes I am filling the form out right, so that [i]s the way I filled it out." When appellant stated that he "relied on their judgment," the judge stated, "That is n[o]t a crime" and found that appellant had not made a plea of guilty. The United States Attorney did not want to deal with count two separately, as this would leave the felony charge for the compensation fraud "hanging out there," and the matter was adjourned until January 28, 1999.

On the January 28, 1999 appearance before the same judge, appellant, in answer to his attorney's questions, stated that he answered "no" to the question on the 1995 Office form asking whether he was self-employed or involved in any business enterprise in the past 15 months, that

he had an interest in a restaurant during that period of time and that the answer “no” on the form would, therefore, be incorrect. Appellant’s plea of guilty was accepted by the court.

By decision dated June 30, 2000, an Office hearing representative found that appellant forfeited the right to compensation during the period March 21, 1994 to June 21, 1995, for knowingly failing to report his activities or involvement with the Treasures of the Sea restaurant.³ The Office hearing representative found that appellant was at fault in the resulting overpayment of compensation on the basis that he made incorrect statements of material facts he knew to be incorrect and failed to furnish information he knew or should have known to be material. The Office hearing representative found that appellant was not entitled to compensation after January 28, 1999 and that he was at fault in the creation of the overpayment of compensation in the amount of \$7,724.10 that arose from payment of compensation after that date. On July 12, 2001 the Office advised appellant that the Office hearing representative’s June 30, 2000 decision did not correctly advise him of his appeal rights; the Office renewed appellant’s appeal rights for one year.

The Board finds that appellant forfeited his right to compensation for the period March 21, 1994 to June 21, 1995, for knowingly failing to report his earnings during that period.

Section 8106(b) of the Act⁴ provides in pertinent part:

“The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies. An employee who--

(1) fails to make an affidavit or report when required; or

(2) knowingly omits or understates any part of his earnings; forfeits his right to compensation with respect to any period, for which the affidavit or report was required. Compensation forfeited under this subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under § 8129 of this title, unless recovery is waived under that section.”

With regard to self-employment, the Office’s federal regulations state: “In general, earnings from self-employment means a reasonable estimate of the rate of pay it would cost the employee to have someone else perform the work or duties the employee is performing. Where self employment is in the form of a corporation, partnership, or sole-proprietorship, a lack of profits for such entity does not remove the employee’s obligation to report the employment or the rate of pay.”⁵

³ The Office hearing representative found that the evidence was insufficient to support forfeiture of compensation beginning April 1993 based on an alleged involvement with a wholesale fish market.

⁴ 5 U.S.C. § 8106(b).

⁵ 20 C.F.R. § 10.125.

Appellant was involved in a business enterprise a restaurant, primarily in an ownership capacity, from April to August 1994. By its specific terms, the Office's Form CA-1032 required that such involvement be reported. On the form he signed on June 21, 1995, covering the previous 15 months, appellant did not report his involvement in this business enterprise.

Appellant, however, can only be subjected to the forfeiture provision of section 8106(b) of the Act if he or she "knowingly" failed to report earnings from employment or self-employment. As forfeiture is a penalty, it is not enough merely to establish that there were unreported earnings.⁶ Being a penalty provision, the forfeiture provided for by section 8106(b) of the Act must be narrowly construed.⁷ The term "knowingly" is defined under the federal regulations to mean with knowledge, consciously, willfully or intentionally.⁸

The Office has the burden of proof to establish that appellant, either with knowledge, consciously, willfully or intentionally, failed to report earnings.⁹ To meet this burden of proof, the Office is required to closely examine appellant's activities and statements in reporting earnings.¹⁰ The Office may meet this burden in several ways: by an employee's admission that they failed to report earnings they knew should be reported; by establishing that an employee pled guilty to violating applicable federal statutes by falsely completing the affidavits in a Form CA-1032;¹¹ or by showing that, upon further inquiry by the Office as to employment activities, the employee continued not to fully and truthfully reveal the nature of the employment activities.¹²

In the present case, the Office relied on appellant's plea of guilty to a violation of 18 U.S.C. § 1920 as the basis of its finding that appellant knowingly failed to report earnings. The Board has found that a guilty plea constitutes persuasive evidence that a claimant knowingly omitted earnings on an Office Form CA-1032.¹³

The Board finds that the evidence establishes that appellant knowingly failed to report his involvement in a business enterprise on the Form CA-1032 he completed on June 21, 1995. The form itself was clear that any involvement in a business enterprise must be reported. At a December 2, 1999 hearing before an Office hearing representative, appellant's accountant

⁶ *Charles Walker*, 44 ECAB 641 (1993).

⁷ *Anthony A. Nobile*, 44 ECAB 268 (1992); *Christine P. Burgess*, 43 ECAB 449 (1992).

⁸ 20 C.F.R. § 10.5(n).

⁹ *Barbara L. Kanter*, 46 ECAB 165 (1994); *Anthony A. Nobile*, *supra* note 7.

¹⁰ See *Royal E. Smith*, 44 ECAB 417 (1993). Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.10(c) (July 1993) states that "the circumstances of the case should be carefully evaluated with respect to the claimant's age, education level and familiarity with the reporting requirements, as well as the nature of the employment/earnings involved and any other relevant factors."

¹¹ *Iris E. Ramsey*, 43 ECAB 1075 (1992).

¹² *Barbara L. Kanter*, *supra* note 9.

¹³ E.g., *James D. O'Neal*, 48 ECAB 255 (1996); *Iris E. Ramsey*, 43 ECAB 1075 (1992).

testified that appellant did “all the setting up” of the restaurant and signed checks for expenses. At a January 20, 1999 hearing before a judge in his criminal case, appellant agreed that he concealed information in filling out the June 21, 1995 Form CA-1032 and at a January 28, 1999 hearing before the same judge, appellant acknowledged that his answer to his answer to the question on self-employment on the June 21, 1995 form was incorrect. This evidence of record establishes that appellant knowingly failed to report his earnings for the period March 21, 1994 to June 21, 1995.

The Board finds that appellant was at fault in the overpayment of compensation that arose from his forfeiture of compensation from March 21, 1994 to June 21, 1995.

Section 8129(a) of the Act provides that where an overpayment of compensation has been made “because of an error of fact or law,” adjustment shall be made by decreasing later payments, to which an individual is entitled. The only exception to this requirement is a situation, which meets the tests set forth as follows in section 8129(b): “Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience.”¹⁴ No waiver of an overpayment is possible if the claimant is not “without fault” in helping to create the overpayment.

Section 10.433 of Title 20 of the Code of Federal Regulations provides:

“A recipient who has done any of the following will be found to be at fault with respect to creating an overpayment:

- (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
- (2) Failed to provide information which he or she knew or should have known to be material; or
- (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual.)”¹⁵

The Office properly found appellant at fault on the basis that he made incorrect statements of material facts he knew to be incorrect and failed to furnish information he knew or should have known to be material. Appellant’s knowing omission of earnings, as found above, constitutes both the knowing and making of an incorrect statement as to a material fact and a knowing failure to furnish material information.¹⁶ As appellant was not without fault in the creation of the overpayment of compensation in the amount of \$27,743.39, the overpayment cannot be waived.

¹⁴ 5 U.S.C. § 8129.

¹⁵ 20 C.F.R. § 10.433(a).

¹⁶ *James D. O’Neal*, 48 ECAB 255 (1996).

The Board finds that the Office properly terminated appellant's compensation effective January 28, 1999.

Section 8148(a) of the Act states:

"Any individual convicted of a violation of section 1920 of Title 18 or any other Federal or State criminal statute relating to fraud in the application for or receipt of any benefit under this subchapter or subchapter III of this chapter, shall forfeit (as of the date of such conviction) any entitlement to any benefit such individual would otherwise be entitled to under this subchapter or subchapter III of this chapter for any injury occurring on or before the date of such conviction. Such forfeiture shall be in addition to any action the Secretary may take under section 8106 or 8129."

To terminate an employee's compensation under section 8148(a) of the Act, the evidence must establish that the individual was convicted and that the conviction is related to the claim for, or receipt of, benefits. The termination is effective on the date of the verdict or on the date the guilty plea is accepted by the court. Because of the criminal basis for the termination, no pretermination notice is required before a final decision is issued.¹⁷

In this case, the record establishes that on January 28, 1999 the U.S. District Court accepted appellant's plea of guilty to a violation of 18 U.S.C. § 1920. Therefore, by specific terms of the statute, appellant forfeited his entitlement to all compensation benefits arising from his employment injuries effective the date of his conviction. Congress has enacted this provision as an absolute forfeiture of compensation, without any provision for any waiver of the effects of this section of the Act.¹⁸ The Office, therefore, properly terminated appellant's compensation effective January 28, 1999 pursuant to section 8148(a).

The Board finds that appellant was at fault in the creation of the overpayment in the amount of \$7,724.10 that arose from his receipt of compensation from January 28 to May 22, 1999.

When appellant was convicted of a violation of 18 U.S.C. § 1920, his attorney knew or should have known that he was no longer entitled to compensation. He nonetheless continued to accept periodic compensation payments until May 22, 1999. As he was at fault in the creation of the overpayment of the \$7,724.10, this overpayment cannot be waived.

¹⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.12 (March 1997).

¹⁸ *Jorge E. Sotomayor*, 52 ECAB ____ (Docket No. 99-452, issued October 6, 2000).

The July 12, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
May 9, 2003

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member